A POSSIBLE FUTURE STATUS OF FOREIGN ASSIGNMENTS TO CREDITORS.

SUCH improvements in the administration of justice as consist of the application of a broader and sounder doctrine than heretofore is to be referred, if we mistake not, to no one single cause in so large a measure as to that marvellous advance which the latter half of this century has witnessed in the means of swift communication between the people of distant countries, or between distant parts of our own vast territory. Not the least among the benefits conferred upon mankind by steam and electricity is to be reckoned the visible liberalizing of the bench that comes of a wider acquaintance with men.

Communities that formerly had always lived as strangers are now brought into close contact, with the wholesome result that each gains something substantial from the other. Prejudices are thus gradually dissipated. This change has not been without its influence upon the field of what, for want of a better term, we are accustomed to denominate the "conflict of laws." American judges are coming to show a disposition to treat at least with a milder form of disfavor the party who appears before them as, in the eye of the law, "a foreigner." There appears to be a tendency (not yet very strong or assertive perhaps, but still a tendency) to accord a little more efficacy to the decree of a foreign tribunal than was customary in earlier days. It finds expression in a disposition to question the wisdom of the rigor of the rule as to the force and effect to be given to the action of a foreign tribunal, a rule hitherto based upon the selfish ground that it is the duty of a court to protect "its own people," so to speak, with small regard to the rights of others who live at a distance.

This disposition, it is true, confines itself at present to such "foreign" tribunals as happen to be the courts of a sister state. To this extent at least, it may be said that a conviction has begun to operate that, after all, it is never quite sound, perhaps, to treat the people of another state as "foreigners." It is now nearly half a century since a justice of the Supreme Court of the United States, while at circuit, remarked: "Sitting here as a court of the United States, we do not think that the different states of this nation are to be regarded, as a general thing, in the relation of

states foreign to each other. Especially should they not be so regarded in regard to questions relating to the commerce of the country, which is coextensive with our whole land, and belongs, not to the state but to the Union."[1] Since these weighty words were uttered, the war for the Union has become history, leaving in its train an universally accepted doctrine of the relation of each state to every other state that, in the popular mind at least, has had the effect to banish the term "foreign" to the very narrowest limits.

A radical change in public sentiment takes time, however, to find its way into the courts; and it may be well that it is so. The day has not yet come when no state of the Union can be pronounced "foreign" to the courts of another state; yet such a day will surely be reached. Meanwhile, we may turn to examine what among the theories sustaining the idea of foreign jurisdiction, as between the states, may first be abandoned with but little disturbance to settled rules of law.

It has occurred to the writer, as it doubtless has occurred to more than one judge upon the bench, that the change would be salutary were courts to declare, in a proper case for the purpose, that the distinction between assignments for the benefit of creditors that are voluntary and those that are involuntary (*i. e.* by operation of law), executed in another state, ought no longer to be sustained. The present rule is well expressed by a text-writer as follows: "An assignment by law has no legal operation out of the state in which the act was passed, while a voluntary assignment, it being by the owner, is a personal right of the proprietor to dispose of his effects for honest purposes."[2]

The scope of the present article does not permit of entering upon an exposition of the origin of this distinction, or upon any extended consideration of the arguments put forward to justify it. All that may be stated here is that the general course of reasoning appears to be this: The voluntary act of an owner, who has a right to dispose of his property and does so, deserves to be respected everywhere. When the law, however, undertakes against the owner's will to pass title in his property to an assignee, the act of the court is not effective beyond the territorial limits within which the court exercises jurisdiction. If the power of the court is recognized outside of these limits, it is because of comity and not of right.

[1] Per Grier, J., Caskie *v.* Webster, 2 Wall. Jr. 131.

[2] Burrill on Assignments (6th edition), 361.

The distinction will not bear strict analysis. It is really little more than a thin disguise that the court of another jurisdiction puts on to hide the truth that it is selfishly denying a remedy, so as to give to citizens of its own jurisdiction a chance to collect their claims against the debtor by attachment or other process.

Comity in this connection, as the text-writers agree, is a term of little or no meaning. It certainly does not signify politeness or courtesy extended by the individual judge, for no such power is possessed by him. Neither does it mean a right. To say the truth, the word is conveniently laid hold of as one of those vague terms like "public policy," for example, under which the court takes shelter, because there is really no other reason to be advanced than expediency.

As for the explanation offered that the decree of a state court has no extra-territorial effect, it is to be remarked that this likewise is a cover to disguise the position that the effect given to the decree is just such as the court of another state sees fit to accord to it. The latter court simply denies the efficacy of the statutes of the sister state. It then proceeds at its pleasure to recognize such statutory effect wherever no injury, in its opinion, will result to its own citizens. The court deals with the question of the propriety of affording recognition, and of applying a known state of facts indisputably proved by the record of a sister state. It is nothing more or less than withholding a remedy in order to favor parties within the jurisdiction. Obviously it is illogical to say that the decree has no extra-territoral effect, and at the same time to give effect to the decree in a qualified way.

So long ago as 1814, a judge of ability and experience, in a discussion of this topic, well remarked: "I take no distinction between the act of law transferring and his own act. He committed the act of bankruptcy, and the law, operating on this, transfers. It works an alienation. It is his own act, what the law does for him, because he must be considered as having originally given an assent to this law which operates the transfer, if it were necessary to recur to the subtlety of first principles in the case, to prove the act of law to be the same thing as a voluntary act on his part."[1] These, to be sure, are the words of dissent; but the judge who took this position had the satisfaction, six years later, to read the following criticism from no less an authority than Chancellor Kent. Speaking of Milne *v.* Moreton, that eminent jurist remarked: "I

[1] Per Brackenridge dissenting, Milne *v.* Moreton, 6 Binney, 360.

have examined that case with great care, as well from respect for the character of the court as for the able discussion which it contains; and I can only be permitted to say that, from the view which I have taken, and the impressions which I have received of the law on the subject, it is not in my power to follow the conclusion of the majority of that court." (Holmes *v.* Remsen, 4 Johnson's Chancery, 488.) The Chancellor in this well-known case, with masterly reasoning undertook to establish the English doctrine as the rule in New York. The opinion goes into an elaborate examination of English and other authorities, and reaches the conclusion that the result of an assignment by proceedings at law is, and ought to be, precisely that of a voluntary transfer, and that its full effect should be everywhere recognized. Notwithstanding the weight of a great name, the efforts put forth in this decision failed of success. The American courts have declined to follow, in this particular, the lead of England. Our attitude may be in part accounted for by reason of the existence of numerous state tribunals, each exercising independent authority at a period when the doctrine of the reserved rights of the state had reached its highest expression, and was holding a sway over the minds of men, to a degree not easily to be conceived of by the present generation.[1]

Should the bankrupt law lately put into operation justify the hopes of its friends by remaining permanently upon the statute-book, these questions of state insolvency orders, or of state receiverships, will, it is likely, become of little consequence. It is to be remarked that the incongruities and disadvantages that attended the administration of justice in state courts had much to do with securing the general bankrupt law. Such a law disposes of the objection, which is at the bottom of the readiness of each state to favor its own attaching creditors, — for the practical outcome of the national bankrupt system is to furnish a reasonable equality to

[1] It is worthy of note that scarcely twenty years ago a great lawyer, afterwards distinguished in public life, did not scruple to incorporate into an argument before the Supreme Court of the United States the following unworthy suggestion, borrowed from the utterances of the highest court of the state of New York. Styling Great Britain the great creditor of the world, counsel says that she might, in the language of Platt, J., in Holmes *v.* Remsen, 20 Johnson, 264: "By issuing a commission against a bankrupt merchant in London, spring a net which shall cover all the effects of such bankrupt throughout the world, and draw them all to her own forum for distribution, . . . for the fact cannot be disguised that Great Britain having the most extended commerce, and her merchants and manufacturers *crediting* abroad vastly more than they *owe* to foreign creditors, has a strong and peculiar interest in contending for a rule which draws to herself the distribution of all the effects which her lucrative commerce has dispersed over the globe." Crapo *v.* Kelly, 16 Wall. 617.

creditors in all parts of the country. In the light of what such a law accomplishes one may readily perceive how a broad interpretation of the relation of the states to each other, in respect to an assignment of the property of a debtor by a decree of the state court, sitting at the domicile, may upon principle work out perfectly just and equitable results. What has really been effected is that the people of the United States, through Congress, have assented to the propriety and justice of such an assignment, instead of the same people, through their several state organizations, coming into a like agreement.

Of course, it is to be understood that in speaking of an assignment of property, personal property is meant. There seems to be no sufficient reason, however, why in the fulness of time general consent may not be had to the doctrine that the court of a state can transfer out of the owner title to his land, situated in another state, provided that the usual requirement be retained of having a decree recorded in the registry where the land lies. To render the exercise of such a power effective legislation would be needed. In order to arrive at harmony of action in an undertaking where so many state legislatures are concerned, of course time and patience and a never-dying hope would have to combine. We are not so sanguine as to say that such a task can be accomplished. We are only insisting, at present, that there is really no difference in principle between personal and real estate, so far as the action of a court is concerned that has plenary jurisdiction over the person of the debtor, provided that courts shall ever arrive at the determination to carry out to its logical results the sound theory that in such cases the act of the law is a full substitute for the voluntary act of the owner.

It is neither wise nor profitable, in contemplating a reform in the administration of justice, to venture far into the future. The conservative habit of the lawyer, one needs not say, is grounded in good sense. It is moreover essential to that steadiness of action by which only can safety be insured to private rights. Yet there is going on silently and slowly a change and growth in the field of judicial labor — a progress toward the ideal standard of perfect justice. The hints which we have ventured here to submit (for they are nothing more than hints),[1] are offered in full confidence

[1] The reader may be interested to turn to a valuable article contributed to these pages by the late Judge Lowell, entitled "Conflict of Laws as Applied to Assignments for Creditors." 1 HARVARD LAW REVIEW, 259 (January, 1888).

"The law of Receivership," by John W. Smith (Chicago, 1897), is a recent work

that the day will come when not a vestige shall be left of the theory that in any possible view two states of this Union can be considered as foreign to each other.

Frank W. Hackett.

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that evinces a thorough study and a capable handling of the subject. See page 166 for an expression of views with which the suggestions, as above set forth, fully accord.